"If the thing appealed from becomes a judgment or order, a decree or rule of the High Court, it would of course be appealable under section 19 of the (Judicature) Act of 1873, and perhaps something which may fill the character of a judgment or order, decree or rule, although not known by those names, may be subject to appeal as being practically within the words by which a right of appeal is given, although the words themselves be not used.

Now the language of section 29 of the Local Government Act, 1888, which we have to construe, provides that the matter (which we shall describe present), is to be decided by the High Court of Justice. If those words are to be taken by themselves, and without reference to the subject-matter dealt with in the section, they certainly imply no right of appeal.

. . . . . .

Now, in this case (again postponing the consideration of the thing to be done under the section, and confining ourselves for the moment to the mere words), there is no rule; there is no order; there is no judgment; there is no decree. The word used in the section is 'decision'.

. . . . . .

And now, dealing with the subject-matter to which the question relates, we cannot doubt that the nature of the matter referred to is one which itself suggests that the application to the High Court of Justice is intended to be purely consultative."

In short, the Court of Appeal decided that the jurisdiction of the High Court upon questions submitted to it under section 29 of the Local Government Act, 1888, was consultative only, and not judicial; that, therefore, the decision of the High Court was not a judgment or order, a decree or rule of the High Court, or something filling the character of a judgment or order, decree or rule; and that, for that reason, no appeal lay from the decision of the High Court to the Court of Appeal under section 19 of the Judicature Act, 1873.

This case was explained by Lord Esher M.R. in the case of *In Re Knight and Tabernacle Permanent Building Society*,[2] at page 617 as follows:—

"In the case of *Ex parte County Council of Kent*, where a statute provided that a case might be stated for the decision of the court, it was held that, though that language might *prima facie* import that there was to be the equivalent of a judgment or order, yet, when the context was looked at, it appeared that the jurisdiction was only consultative and that there was nothing which amounted to a judgment or order."

It is contended on behalf of the appellants that the jurisdiction exercised by the High Court when it remits the case stated to the board with its opinion under section 82 of the Income Tax Ordinance is not merely consultative, because under subsection (6) the board is bound by the opinion of the High Court and shall give effect thereto by its decision. The answer to this contention is that where the High Court merely remits the case stated to the board with its opinion it is the board which has to give a decision. Section 81(2) of the Income Tax Ordinance provides a right of appeal to the High Court from the decision of the board upon any question of law or of mixed law and fact. Section 81(4) says:—

"The High Court shall hear and determine any such appeal and may confirm, reduce, increase, or annul the assessment determined by the board, and make such further or other order on such appeal, whether as to costs or otherwise, as to such court may seem fit."

Section 81(5) says:—

"There shall be such further right of appeal from decisions of the High Court under this section as exists in the case of decisions made by such court in the exercise of its original civil jurisdiction."

It is said that, if after the board has given effect to the opinion of the High Court delivered under section 82 of the Ordinance and an appeal is brought against the decision of the board to the High Court under section 81, it will not be open to the High Court to say that the board has gone wrong because the board merely did what it was bound to do. I do not think this is correct. It seems to me that the High Court has full jurisdiction to decide whether the decision of the board was right or wrong even though that decision was given in accordance with an opinion of the High Court.

For the above reasons I come to the conclusion that this court has no jurisdiction to hear an appeal from the opinion of the High Court delivered under section 82 of the Income Tax Ordinance so long as the High Court does no more than remit the case stated to the board with its opinion. Such an opinion, although it is a decision, does not amount to a judgment or order within the meaning of section 67 of the Courts of Judicature Act, 1964. I would therefore set aside the notices of appeal filed by the appellants and stay all further proceedings in the appeals and order the appellants to pay the respondent the costs of the applications.

Wee Chong Jin C.J. and **Tan Ah Tah F.J.** concurred.

Notices of appeal set aside. Further proceedings stayed.

Solicitors: *Elias Bros.; L. A. J. Smith; Rodyk & Davidson.*

HOONG CHIN WAH v. CHEAH KUM SWEE & ANOR.

[F.C. (Barakbah L.P., Azmi C.J. and Chang Min Tat J.) October 29, 1966]

[Ipoh — Federal Court Civil Appeal No. 383 of 1964]

Practice and Procedure — Appeal — Appeal based on claim abandoned at the trial — Discretion of court — Federal Court (Civil Appeals) (Transitional) Rules, 1963, rr. 8(4) and (5).

The appellant in his appeal sought to rely on a claim which had been abandoned by him at the trial. The respondents urged that the appellant should not be allowed to proceed with the appeal on grounds which had been abandoned.

Held: (1) the question as to whether an appellate court should allow a new point or a point abandoned in the court below to be argued before it is a matter of discretion, and the court will only exercise its discretion to allow such new point or abandoned point to be argued in exceptional circumstances;

(2) there were no such exceptional circumstances in this case and therefore the appeal would be dismissed.

Cases referred to:—

(1) *Pancham & Ors.* v. *Ansar Hussain* A.I.R. 1926 P.C. 85.

(2) *Ghulam Sarwar & Anor.* v. *Nayazali & Ors.* A.I.R. 1921 Oudh. 41.

(3) *Hickman* v. *The Kent or Romney Marsh Sheep Breeders Association* (1920), 37 T.L.R. 163.

(4) *Ex parte Reddish, In re Walton* (1877), 5 Ch. D. 882.

(5) *Adib El Hinnawi* v. *Yacoub Fahmi Abu El Huda El Faruq* [1936] M.L.J. 123.

(6) *Susur Rotan Mining Ltd.* v. *Siow Wong Fatt & Anor.* [1965] 2 M.L.J. 45.

(7) *Galwant Singh* v. *Abdul Khalik* [1965] 2 M.L.J. 55.

(8) *Fanny Skinner* v. *Bank of India* 62 I.A. 115.

(9) *Ahamath* v. *Sariffa Umma* [1931] A.C. 799.

(10) *Lala Kalyam Das & Ors.* v. *Shaik Mahbuh Ahmad* A.I.R. 1918 P.C. 53.

(11) *The Tasmania* (1890), 15 App. Cas. 223, 225.

(12) *Perkowski* v. *Wellington Corporation* [1959] A.C. 53, 69.

(13) *Connecticut Fire Insurance Co.* v. *Kavanagh* [1892] A.C. 473, 480.

FEDERAL COURT.

K. Rajanayagam for the appellant.

E. K. Yeap for the 1st respondent.

N. Sharma for the 2nd respondent.

Cur. Adv. Vult.

Azmi C.J.: The plaintiff (hereinafter referred to as the appellant) appeals against the judgment of the High Court at Ipoh dismissing his suit. There was also a counterclaim by the defendant (hereinafter referred to as the respondent) and this counter-claim was also dismissed.

The appellant now appeals to this court and his grounds of appeal in paragraph (1) of petition of appeal reads as follows:—

"Your petitioner submits with respect that:

(a) having regard to the issues agreed between counsel appearing on behalf of the parties before the learned trial judge

(b) having regard to the facts found by the learned trial judge to have been admitted by the parties

(c) having regard to the findings of fact of the learned trial judge

the learned trial judge ought in law to have awarded compensation to your petitioner in respect of the sums of money spent by your petitioner and so found to have been spent by the learned trial judge, in carrying out all work whatever necessary so as to enable the relevant portion of the relevant land to be worked for the purposes of winning therefrom tin ore."

Paragraph 2 of the petition reads as follows:—

"Your petitioner submits with respect that even accepting that the respondents were entitled by reason of the refusal of your petitioner to sign the documents marked as P. 12(a) to (c) to put an end to the arrangements the learned trial judge ought in law to have made an order requiring the respondents to restore to your petitioner the benefits received by the respondents."

Paragraph 3 reads as follows:—

"Your petitioner prays that this Honourable Court may be pleased to set aside the order of the learned trial judge in so far as it dismisses the claim of your petitioner and make an order entering judgment in favour of your petitioner for the assessment of compensation by this Honourable Court or by the learned trial judge with costs in this Honourable Court and in the court below."

Counsel for the respondents on a preliminary objection submitted that the appellant should not be allowed to proceed with his appeal because the grounds upon which he now appeals to this court were on a matter which the appellant himself had abandoned.

Paragraph 2 of the amended statement of claim reads as follows:—

"2. In or about the month of January, 1964 the defendants stated to the plaintiff that the first defendant was making arrangements to obtain a permit to mine to work the said portion, took the plaintiffs to the said portion, showed him the said portion and agreed to grant to the plaintiff the right to work the said portion for the purpose of winning therefrom tin ore.

3. Relying on the verbal arrangements made between the defendants of the one part and the plaintiff of the other part the plaintiff conducted an inspection of the said portion carried out pitting operations thereon, constructed the necessary approach road and the bridge across a stream, erected two pump houses, palong, laid the necessary pipes, constructed the necessary equipment to carry out mining operations; the plaintiff also arranged for the necessary men to work the said portion for the purpose of winning therefrom tin ore.

4. x x x x x

5. To date hereof the plaintiff has spent the total sum of $60,000.68 in respect of work carried out by him on the said portion.

6. The defendants and each of them wrongfully and maliciously and with intent to injure the plaintiff conspired and agreed together to terminate the verbal arrangements made between the plaintiff of the one part and the defendants of the other part pursuant whereto the plaintiff performed the work hereinbefore recited and incurred the expenditure of $60,000.68; by letter dated the 13th day of July, 1964 the first defendant purported to terminate the rights conferred upon the second defendant by the agreement of the 31st day of March, 1964.

On the first day of the hearing, the suit was adjourned *inter alia* in order to enable counsel to settle the issues upon which the suit could be disposed of by the trial court.

The next day counsel appeared before the judge in chambers and submitted the agreed issues in writing. At that hearing counsel for

the appellant (plaintiff) informed the court that he was basing his claim for damages in tort only and not for breach of contract.

The effect of this was that the appellant had therefore abandoned all his claims except for the claim in damages for the tort of conspiracy as alleged in paragraph 6 of his statement of claim. It is apparent that the amount the appellant claimed for breach of contract and alternatively for conspiracy was for a similar amount of $60,000.68.

The learned judge himself in his judgment noted as follows:—

"But it would appear that the basis of the plaintiff's claim for damages is not breach of contract but a claim in tort for damages suffered by the plaintiff in consequence of an alleged conspiracy between the defendants to frustrate the implementation of the arrangements made in the month of January and February 1964 to grant the plaintiff the right to mine the land."

Both Mr. Sharma and Mr. Yeap for the respondents in a preliminary objection urged this court that the appellant should not be allowed to proceed with his appeal under his grounds of appeal on the ground that he has abandoned the claim under contract.

In support they cited to us several cases but I need only refer to the following.

(1) *Pancham & Ors.* v. *Ansar Hussain* [1] — The headnote reads as follows:—

Where plaintiff mortgagee first alleged that the date of the cause action was the date when the agreed term expired, *viz.* 21st February 1905, but later on amended the plaint by saying that it was the date when there was a default in payment of an instalment on the agreed date, *viz.* 21st February 1894 according to the terms agreed to in the mortgage deed and alleged, but failed to prove, payment of interest on later dates. **Held:** that he could be allowed to revert to the position taken in the unamended plaint with respect to the cause of action.

At page 88 the judgment of the Privy Council reads as follows:—

"Having made a finding of fact in the same sense, the trial judge, by his judgment of the 31st May 1918, dismissed the suit with costs. That was, their Lordships think, his proper course. No other issue was or is, on the pleadings, open to the plaintiffs, and their conduct in this matter is not such as to entitle them to claim any more than strict treatment. On their own chosen issue they fought: to that issue they directed evidence which was not believed; on it therefore, they failed. And by that failure they must abide. Their appeal to the High Court should have been dismissed, as their Lordships think, on the same ground. The contention which that court combated by its deliverance already referred to was not on their pleadings open to the appellants, who, for the same reason, cannot on their appeal to this board be heard to say, as they must say, if the appeal is to succeed, that their cause of action did not accrue to them until the 21st February 1905, an allegation which, originally made, was, as has been seen, deliberately abandoned in their amended plaint."

(2) The case of *Ghulam Sarwar & Anor.* v. *Nayazali & Ors.* [2] In this suit the plaintiff claimed for a share in the estate of his deceased brother under Muslim law, against his widow. She claimed to have succeeded to the entire property of the deceased under a family custom. The trial judge held that she succeeded for life to this property. In that event the plaintiff asked for an alternative relief for a declaration that he was entitled to her property after her death. This was refused. On appeal to the district court, plaintiff still disputed the custom and also pleaded in the alternative a declaratory relief but contented himself with arguing the appeal on question of right. He then before the Privy Council asked that he be allowed to appeal on his claim for declaratory relief and on this ground only. The Privy Council refused him and said as follows:—

"The appellant cannot be allowed to urge his appeal on this ground. It is not a mere question of an admission on a point of law as suggested by the appellant. The principle is that a party ought not to be allowed to be harassed by a superior court on a point which was either never raised or deliberately abandoned in the court below. The principles laid down by the Privy Council in *Lala Kalyam Das & Ors.* v. *Shaikh Mahbuh Ahmad* are equally applicable to a High Court. They lay down in that case that the High Court ought not to be liable to have its determinations overruled upon matters never submitted to it, and that the same principle applied to a point which, though mentioned in the grounds of appeal, the appellant's advocate deliberately elected not to press. It is possible that there may be exceptional circumstances which might justify a departure from this rule but no such circumstances exist in this case."

Mr. Sharma also referred us to two English cases *Hickman* v. *The Kent or Romney Marsh Sheep Breeders Association* [3] and *Ex parte Reddish, In re Walton* [4] where James L.J. said as follows:—

"I am disposed to think that the mode in which this money was obtained cannot be exactly approved of, and that the bank manager ought to have told the debtor that his cheques had been really already dishonoured. But that is an entirely different case from the case which was at first raised, which was that there had been a fraudulent preference on the part of the debtor, and not that there had been a wrong committed against him, which rather seems to be the case made out by the evidence. If the money was obtained by anything like a wrong or a fraud upon the debtor, it is possible that an action may lie against the bank to recover it. But that question is not before us now, and I do not wish to encourage further litigation.

His Lordship added that, unless the former decisions were to be overruled, it was clear upon the evidence that there was sufficient pressure to negative the notion that there was any fraudulent preference. The decision of the Chief Judge must, therefore, be affirmed."

(3) *Adib El Hinnawi* v. *Yacoub Fahmi Abu El Huda El Faruq.* [5] In an action in the district court in Jaffa, the plaintiff, the widower of one Fatmeh Mohammad deceased claimed against Yacoub Fahmi, the heir of the said deceased for payment of a sum of money on a promissory note alleged to be executed by the deceased. The question to be decided by the court was whether the promissory note was executed by the deceased

and whether there was consideration for the note. After two retrials the trial court decided that there was no real consideration for the promissory note and expressed the opinion that the services rendered to the deceased by the plaintiff were not equivalent to the value of the note. On further appeal to the Court of Appeal, it set aside the judgment of the district court and entered judgment for the plaintiff. The defendant appealed to the Privy Council and argued that (1) there was no consideration given for the promissory note and (2) that the promissory note was obtained by undue influence on the part of the plaintiff. With reference to the second ground of undue influence the Privy Council said as follows:—

"With regard to the plea of undue influence their Lordships are of opinion that inasmuch as the plea was not pressed in the courts below, with the result that there is neither specific evidence nor any direct finding with regard to it, they are absolved from the necessity of dealing with the matter in detail now. It is manifest from the proceedings that it was open to the appellant to have urged the plea in the courts below to an issue, in other words to have claimed and obtained a judicial decision upon it. The appellant omitted to do this and it is therefore quite impossible in their Lordships' opinion on the materials available to them to set aside the judgment appealed against and to affirm the plea of undue influence."

Mr. Rajanayagam, however, urged that by virtue of Rules 8(4) and (5) of the Federal Court (Transitional) Rules and also of the cases cited by him which I shall refer to later, this court has a discretion to consider his grounds of appeal. He cited to us the following cases. *Susur Rotan Mining Ltd.* v. *Siow Wong Fatt & Anor.*,[6] *Galwant Singh* v. *Abdul Khalik*,[7] *Fanny Skinner* v. *Bank of India*,[8] *Ahamath* v. *Sariffa Umma*.[9] — a Palestine case, *Lala Kalyam Das & Ors.* v. *Shaik Mahbuh Ahmad*.[10]

In *Galwant Singh's* case, this court said:—

"A point which is not raised at the trial and which is raised for the first time in the Court of Appeal must always be most jealously scrutinised (*The "Tasmania"* [11]). The question of whether effect should be given to such a point is, however, one for discretion (see *Perkowski* v. *Wellington Corporation* [12] and the principles on which that discretion may be exercised have been this set out in the case of *Connecticut Fire Insurance Co.* v. *Kavanagh* [13] (per Lord Watson):—

"When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

I need I think, refer to another case upon which as I understood Mr. Rajanayagam mainly relied. That is the case of *Susur Rotan Mining Ltd.* v. *Siow Wong Fatt & Anor.* In this case the appellant claims damages on a breach of contract. At the trial their counsel urged that if appellant's claimed should fail they would still be entitled to recover from the respondents the money that was spent by them under section 71 of the Contracts (Malay States) Ordinance. The trial court dismissed the claim. On appeal to the Federal Court it was held that the appellants were entitled to compensation under that section even though they had not specifically pleaded such compensation. In this case it has never been denied that the appellants had spent a great deal of their own money on taking steps that were necessary before the State would grant the respondent his lease and I quote the judgment at page 49:—

"It was not spent gratuitously because Susur Rotan clearly had no intention that anybody else should have the benefit of it for nothing. And the person who has enjoyed the benefit is Mr. Siow. The money had to be spent by somebody to transform Mr. Siow's prospects and then his lease into a profitable mining proposition, it had to be spent by somebody at some time, and it seems a matter of ordinary common sense that the fact that it had been spent and did not have to be spent in future must have affected the nature of Mr. Siow's subsequent arrangements with Siow Wong Fatt Mining Company, Limited, and Kota. In the circumstances it seems clear that Mr. Siow must pay compensation under section 71."

In the present appeal however, whatever money the appellant has spent he has himself benefited, because the permit which was given by the owner of the mine to work to the first respondent has been withdrawn and either given or promised to the appellant.

It is abundantly clear from the cases cited above by both counsel that the question as to whether an appellate court should allow a new point or a point abandoned in the court below to be argued before it is a matter of discretion. Though the rule would appear to be that the court should only allow such new point or abandoned point to be argued in exceptional circumstances. In my own view, no such exceptional circumstances exist in this case. I would therefore allow the objection urged on behalf of the respondents and dismiss the appeal with costs.

Barakbah L.P. and **Chang Min Tat J.** concurred.

Appeal dismissed.

Solicitors: *K. Rajanayagam; Yeap & Yeap; N. Sharma.*